



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 13, 1998

Mr. John Steiner  
Division Chief  
City of Austin  
Law Department  
P.O. Box 1088  
Austin, Texas 78767-1088

OR98-1213

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under the Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 114772.

The City of Austin (the "city") received several requests for customer related information from the city's water and electric utility customer databases.<sup>1</sup> In response to the request, you submitted to this office for review a representative sample of the information which you assert is responsive.<sup>2</sup> You claim that the requested information is excepted from disclosure under sections 552.101, 552.104 and 552.110 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>We note that while four of the requestors specifically ask for information about either residential or commercial customers, the other two requests did not make such a distinction. Further, only one of the four requests asked for water utility customer information. Since in each case the request is for a city utility customer list, we are combining these related requests.

<sup>2</sup>We note that one of the requestors requests that the information at issue "be written to 9-track magnetic tape @ 6250 BPI." Chapter 552 does not require the preparation of information in the form requested by a member of the public, unless the information exists in an electronic format. *See* Gov't Code § 552.231; *see also id.* section 552.228 (regarding information in electronic format). We suggest that if you have any concerns over the costs associated with providing the requestor with the information at issue in "electronic format," that you contact the Open Records Administrator for the General Services Commission. *See* Gov't Code §§ 552.261-.273.

As a preface to our discussion of the claimed exceptions, we note that House Bill 859, Act of May 23, 1993, 73d Leg., R.S., ch. 473, 1993 Tex. Gen. Laws 1864, codified at V.T.C.S. article 1446h, pertains to the confidentiality of certain information of customers of a government-operated utility.<sup>3</sup> In general, article 1446h, section 2 deems confidential "personal information in a customer's account records" if the customer has requested that the governmental body maintain the information as confidential.<sup>4</sup>

In Open Records Decision No. 625 (1994), this office determined that article 1446h, section 2 provides confidentiality only for information relating to natural persons; it does not protect the information of entities such as corporations, partnerships, or other business associations. Open Records Decision No. 625 (1994) at 3-4. Therefore, to the extent the requested customer information consists of "personal information" relating to a natural person who has requested that the city maintain the information as confidential, the city must withhold such information from public disclosure pursuant to article 1446h.

Alternatively, the fact that article 1446h may prohibit a government-operated utility from releasing personal information about an individual to a particular requestor is irrelevant when the requested information concerns a business. However, we have not construed article 1446h to deem information about a non-residential customer of a government-operated utility open for all purposes, without regard to the Open Records Act. Rather, we believe such information is subject to the Open Records Act. Therefore, we will next consider the claimed exceptions for both those individual customers who did not request that the city maintain their personal information as confidential and the city's list of non-residential customers.

Turning to the exceptions you raise, we will begin by discussing section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. However, section 552.110 generally is designed to protect *third party* interests that have been recognized by the courts. Open Records Decision No. 319 (1982).

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<sup>3</sup>Article 1446h, section 1(1), V.T.C.S., defines "government-operated utility" as an entity that

(A) is a governmental body or is governed by a governmental body, as defined by . . . Article 6252-17a, [V.T.C.S.]; and

(B) provides water, wastewater, sewer, gas, garbage, electricity, or drainage services for compensation.

V.T.C.S. art. 1446h, § 1(1) (footnote omitted).

<sup>4</sup>Article 1446h, section 1(2) defines "personal information" as "an individual's address, telephone number, or social security number."

This office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if a prima facie case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5.

In this instance, the city has failed to establish a prima facie case that this information is a trade secret, because the city did not provide us with written comments explaining how section 552.110 may apply to the information at issue. Therefore, we have no basis upon which to pronounce the information is protected under the trade secret prong of section 552.110. *See* Open Records Decision Nos. 494 (1988) (customer lists may be withheld only if they meet six criteria of the Restatement of Torts and federal authority indicates that customer lists do not ordinarily constitute trade secrets), 363 (1983) (third party duty to establish how and why exception protects particular information), 402 (1983) (this office cannot conclude that information is trade secret unless the governmental body or third-party has provided evidence of the factors necessary to establish a trade secret claim). Consequently, we do not believe that the city has demonstrated that the requested information constitutes "trade secret" information protected by section 552.110.

We next address whether section 552.101 requires the city to withhold any of the submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 32.101 of the Utilities Code provides in part:

c) The [Public Utilities Commission] shall consider customer names and addresses, prices, individual customer contracts, and expected load and usage data as highly sensitive trade secrets. That information is not subject to disclosure under Chapter 552, Government Code.

It is the city's contention that "[t]he legislature has found the requested information to be a trade secret and made it confidential by law under section 32.101(c) of the Utilities Code." We disagree with the city's argument for several reasons. The statute only makes reference to the Public Utilities Commission. Furthermore, although the statute refers to customer information as "highly sensitive trade secrets," it does not state that the information is confidential. Our reading of the statute requires the city to provide a valid trade secret argument under section 552.110, which in this case the city did not adequately address, in order for the customer lists to be considered a trade secret. *See* Open Records Decision Nos. 309 (1982) (reach of section 552.110 is no greater than that afforded by section 552.101), 233 (1980). We do not believe that section 32.101(c) is applicable in this instance. Therefore, you may not withhold any information under section 32.101(c) of the Utilities Code.

Section 552.104 states that:

[i]nformation is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

Generally, section 552.104 protects a governmental body's interests as they relate to a competitive process in which third parties are bidding to contract with the government. *See* Open Records Decision Nos. 592 (1991) (exception protects interests of governmental body, usually in competitive bidding situations), 583 (1990), 554 (1990). In Open Records Decision No. 593 (1991), however, this office for the first time held that a governmental body might be deemed, under certain circumstances, to be a "competitor" in the marketplace. Furthermore, the decision concluded that a governmental body must demonstrate that release of requested information could cause specific harm to that body's legitimate marketplace interests. Open Records Decision No. 593 (1991) at 9.

Whether release of requested information would harm the legitimate marketplace interests of the city requires a showing of the possibility of some specific harm in a particular competitive situation. The city asserts that "[t]he fact of the electric utility business in Texas today is that *commercial (non-wholesale level) customers are entering long term contracts with electric utilities and other providers of electricity. . . .* As a result, providing customer lists would impair the competitive ability of Austin's utility." However, the requests in this case are for residential and commercial customers, and you have not offered any support that the city's utilities are in a competitive position with other utility providers. Specifically, the city demonstrated no competitive interest in withholding information related to its customers who are located in areas served only by the city. We conclude that the city has not demonstrated that release of this information may cause specific harm to the city's legitimate marketplace interests. In this instance, we conclude that the city has not met its burden under section 552.104 of the Government Code.

Since none of the claimed exceptions were adequately supported by the city's arguments, we conclude that the requested information, except for the information subject to article 1446h, must be released to the requestors. We are resolving this matter with an informal letter ruling rather than with a published open records decision.<sup>5</sup> This ruling

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<sup>5</sup>In reaching our conclusion, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988)(where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Sam Haddad". The signature is fluid and cursive, with a large loop at the beginning of the first name.

Sam Haddad  
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Open Records Division

SH/rho

Ref.: ID# 114772

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